

## Satisfaction of Claims against Vietnam for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975

Thomas J. Lang

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# Satisfaction of Claims Against Vietnam for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975

*Thomas J. Lang\**

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## Introduction

In the last days of April 1975, U.S. citizen Bill Miner and his family fled their seaside home near Saigon, South Vietnam to escape advancing North Vietnamese Army units.<sup>1</sup> In their haste to leave, the Miners left behind their house, beach villa, hotel, restaurant, shrimp farm, heavy equipment company, a roomful of cash, and a fifty-six-foot yacht.<sup>2</sup> The Miners' property, valued at \$1.2 million was, like all commercial enterprises in South Vietnam, subsequently seized by communist authorities without compensation to the former owners.<sup>3</sup>

On February 3, 1994, President Clinton lifted the U.S. economic embargo on Vietnam.<sup>4</sup> This decision accelerated the prospects for rapid normalization of relations between the two countries. While the termination of the embargo was clearly the most important prerequisite to improved relations between the United States and Vietnam, several issues will influence the pace and scope of normalization.<sup>5</sup> For example, continued progress in the resolution of remaining Prisoner-of-War/Missing-in-Action (POW/MIA) cases and improvement in Vietnam's domestic human rights record are crucial if full diplomatic relations are to be established.<sup>6</sup>

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1. *Vietnam Legal Battle Looms; Americans Want Payments for Property*, ST. LOUIS POST DISPATCH, Feb. 6, 1994, at 1A.

2. *Id.*

3. See Claim of Betty Janet Mitchell, Claim No. V-0358, Dec. No. V-0259, at 2-3 (FCSC Mar. 11, 1985); see also J. Jeffrey Brown, Note, *The Jurisprudence of the Foreign Claims Settlement Commission: Vietnam Claims*, 27 VA. J. INT'L L. 99, 100 & n.5 (1986) (citing Communiqué No. 3 of the Saigon-Gia Dinh City Military Management Committee, Foreign Broadcast Information Service Daily Report: Asia and Pacific (NTIS) L-2, L-3 (May 1, 1975); *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 857 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

4. Douglas Jehl, *Opening to Vietnam: Clinton Drops 19-Year Ban on U.S. Trade with Vietnam*, N.Y. TIMES, Feb. 4, 1994, at A1.

5. See generally *U.S. Relations With Vietnam: Hearings Before the Subcomm. on East Asian and Pacific Affairs of the Sen. Foreign Relations Comm.*, 103d Cong., 2d Sess. (1994) (testimony of Winston Lord, Asst. Sec. State for East Asian and Pacific Affairs, U.S. Department of State) [hereinafter *Lord Testimony*].

6. See *id.* Assistant Secretary of State Lord testified in the Senate as to the significance of lifting the embargo in relation to the process of establishing normal diplomatic relations with Vietnam:

The steps we have taken [in lifting the embargo] do not represent full normalization of relations with Vietnam. We are not opening embassies or exchanging ambassadors. We are not granting Vietnam special economic privileges. We retain considerable political and economic incentives to ensure that the government of Vietnam does not waiver from its commitment to continue its cooperation on POW/MIA issues . . . [Lifting the embargo] will also serve to expand our dialogue with Vietnam on many issues, including human rights

Another significant obstacle to normalized relations was the claims of U.S. corporations and citizens, like Bill Miner and his family, whose property was seized by Communist authorities when South Vietnam was overrun by North Vietnamese forces in April 1975.<sup>7</sup> Consequently, the Clinton Administration, shortly after lifting the trade embargo in February 1994, sent a negotiating team to Hanoi to begin discussions on Vietnam's payment of \$200 million in U.S. claims.<sup>8</sup> Almost a year later, the United States and Vietnam announced that Vietnam had promised to pay the full value of the claims, totalling \$208.5 million, as part of a wider agreement establishing diplomatic liaison offices in Hanoi and in Washington and including a promise that the United States would unfreeze Vietnamese assets held by U.S. banks since 1975.<sup>9</sup>

Part I of this Note reviews the impediments to normalization of relations between the United States and Vietnam, which for two decades precluded resolution of the claims of U.S. citizens for expropriated property. These impediments included the U.S. economic embargo, the POW/MIA issue, military cooperation between Vietnam and the former Soviet Union, human rights abuses, and Vietnam's occupation of Cambodia. Part II summarizes the principles of international law regarding compensation for expropriated or seized property of foreign nationals and foreign corporations, including the ongoing debate over whether "full" compensation is required in every instance of nationalization or expropriation. Part III examines the history, organization, and jurisprudence of the Foreign Claims Settlement Commission (FCSC), an important component of the U.S. claims settlement process. Part IV reviews the FCSC's Vietnam Claims Program, including the size and nature of the private claims against Vietnam, the eligibility requirements of claimants, the FCSC's definition of "property," and the valuation techniques utilized in assessing awards. Finally, part V examines the traditional use of "lump-sum" settlement agreements by the U.S. government to obtain monetary satisfaction of American claims.

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. . . . The vastly increased numbers of American visitors, tourists, business people, and other private groups who will now spread out across Vietnam, should produce greater openness, greater contacts, greater information on our MIAs and concrete results.

7. See discussion *infra* part IV.

8. *U.S. Delegates to Visit Vietnam, Cambodia*, REUTERS, Feb. 22, 1994, available in LEXIS, News Library, Curnws File. The initial negotiating team was led by James Hall, Director of the Office of Vietnam, Laos and Cambodia Affairs, and Ronald Bettauer, Assistant Legal Advisor, both from the Department of State. The delegation also included officials from the Departments of Justice and Treasury. *Id.*

9. Steven Greenhouse, *U.S. and Vietnam Plan to Exchange Low-Level Envoys*, N.Y. TIMES, Jan. 28, 1994, at A1.

## I. Historical Background

### A. Impediments to Resolution of Expropriation Claims

#### 1. The POW/MIA Issue

The Paris Peace Accords<sup>10</sup> of January 1973 formally ended direct U.S. military involvement in the Vietnam conflict. When South Vietnam (the Republic of Vietnam) fell to North Vietnamese forces on May 1, 1975,<sup>11</sup> the United States refused to recognize North Vietnam (the Democratic Republic of Vietnam) as the legitimate government in the area of South Vietnam, and it extended trade and diplomatic sanctions already in place against North Vietnam to all of Vietnam.<sup>12</sup> Several additional developments contributed to the continuation of the U.S. embargo for the next nineteen years. First and foremost was the lack of cooperation from Vietnam in resolving the fate of American POW/MIAs. During the course of the Vietnam War, North Vietnamese and Viet Cong troops in Vietnam and Pathet Lao guerrillas in Laos took more than 600 U.S. servicemen as "prisoners of war" (POWs).<sup>13</sup> By the end of the conflict, over 1,276 additional servicemen were reported as "missing-in-action" (MIA) in Southeast Asia, and approximately 1,118 servicemen were listed as "killed-in-action" with their "bodies not recovered" (KIA-BNR).<sup>14</sup>

Although North Vietnam was a signatory to the Third Geneva Convention on the Treatment of Prisoners of War,<sup>15</sup> it failed to observe many of the Convention's most important provisions. For example, North Vietnam tortured and killed U.S. POWs in violation of article 70, publicly displayed and humiliated them in violation of article 71, failed to report their names in violation of article 122, and denied them the right to exchange

10. Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, 24 U.S.T. 1, 935 U.N.T.S. 2 [hereinafter Paris Peace Accords]. The Treaty also contained four protocols including a Protocol on Prisoners and Detainees. On the military side, the agreement provided for an immediate cease-fire (art. 2), the withdrawal of all U.S. forces from South Vietnam within 60 days (art. 5), the return of military and civilian POWs held by all sides within 60 days (art. 8), and a prohibition on the introduction of troops, military advisers, or personnel into South Vietnam except to replace damaged or destroyed equipment (art. 7).

With respect to political issues, the Treaty provided for the exercise of the right of self-determination by the South Vietnamese people (art. 9), the formation by the Provisional Revolutionary Government of the Republic of South Vietnam (PRG or Viet Cong) and the Government of the Republic of Viet Nam (South Vietnam) of a National Council of National Reconciliation and Concord to organize free and democratic elections (art. 12), the reunification of Vietnam by peaceful means (art. 15), and a U.S. commitment to contribute to the post-war reconstruction of Indochina, including Vietnam (art. 21).

11. GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975*, at 261 (1979).

12. See discussion *infra* notes 46-50 and accompanying text.

13. POW/MIA'S: REPORT OF THE SELECT COMMITTEE ON POW/MIA AFFAIRS, S. REP. NO. 1, 103d Cong., 1st Sess. 144 (1993) [hereinafter SELECT COMMITTEE REPORT].

14. *Id.* at 144-45.

15. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention].

letters or receive visits from international humanitarian agencies (such as the Red Cross) in violation of article 125.<sup>16</sup> Several years of intense international, diplomatic, and media pressure between 1965 and 1969 eventually convinced the Communist leaders in Hanoi to release what turned out to be partial lists of the names of the POWs they were holding.<sup>17</sup>

With the signing of the Paris Peace Agreements in January 1973, North Vietnam and the Viet Cong agreed to return within sixty days all 591 American POWs they claimed to be holding.<sup>18</sup> North Vietnam and the Viet Cong also agreed to cooperate in resolving the fates of remaining MIAs and to assist in retrieving the remains of KIAs whose bodies had not already been recovered.<sup>19</sup> In return, the United States agreed to withdraw virtually all its military personnel from South Vietnam and pledged to provide financial assistance for post-war reconstruction.<sup>20</sup> In a secret letter from President Richard Nixon to North Vietnam President Pham Van Dong dated February 1, 1973 (four days after the signing of the Paris Peace Accords), Nixon proposed to recommend to Congress an appropriation of \$3.25 billion in reconstruction aid and \$1.0-1.5 billion in other forms of aid.<sup>21</sup>

U.S. officials were disappointed that more live American prisoners were not included on the lists of those to be returned.<sup>22</sup> Officials were particularly disappointed that only ten Americans lost or captured in Laos would be returned.<sup>23</sup> U.S. records showed that 352 military men were listed as POW or MIA in Laos, and top military and intelligence officials had hoped that as many as forty-one servicemen lost in Laos would be returned as prisoners.<sup>24</sup> Government officials had also hoped that an additional eighty or so Americans believed captured in North and South Vietnam would be returned.<sup>25</sup>

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16. For documentation of North Vietnam's violations of the POW Convention, see, e.g., EVERETT ALVAREZ, *CHAINED EAGLE* (1989); SCOTT BLAKEY, *PRISONER AT WAR: THE SURVIVAL OF COMMANDER RICHARD A. STRATTON* (1978); LARRY GUARINO, *A POWS STORY: 2801 DAYS IN HANOI* (1990); CRAIG HOWES, *VOICES OF THE VIETNAM POWS: WITNESSES TO THEIR FIGHT* (1993); JOHN G. HURBELL, *POW: A DEFINITIVE HISTORY OF THE AMERICAN PRISONER-OF-WAR EXPERIENCE IN VIETNAM, 1964-1973* (1976); SAM JOHNSON, *CAPTIVE WARRIORS: A VIETNAM POWS STORY* (1992); MALCOLM MCCONNELL, *INTO THE MOUTH OF THE CAT: THE STORY OF LANCE SJAN, HERO OF VIETNAM* (1985); WINNIE WAGAMAN, *CIVILIAN POW: TERROR AND TORTURE IN SOUTH VIETNAM* (1989).

17. SELECT COMMITTEE REPORT, *supra* note 13, at 141-42.

18. Paris Peace Accords, *supra* note 10, art. 8, Protocol on Prisoners and Detainees.

19. *Id.*

20. *Id.* art. 21. Article 21 of the Accords provides:

The United States anticipates that this agreement will usher in an era of reconciliation with the Democratic Republic of Vietnam as with all the peoples of Indochina. In pursuance of its traditional role, the United States will contribute to healing the wounds of war and to postwar reconstruction of the Democratic Republic of Vietnam and throughout Indochina.

*Id.*

21. SELECT COMMITTEE REPORT, *supra* note 13, at 74-75.

22. *Id.* at 82, 147-48.

23. *Id.* at 82-83.

24. *Id.*

25. *Id.* at 145.

By late 1973 it was clear that Congress would never appropriate the \$3.25 billion in reconstruction aid which Nixon had pledged. Consequently, cooperation from North Vietnam on the POW/MIA issue dwindled and, by early 1974, had virtually ceased.<sup>26</sup> North Vietnam's subsequent full-scale invasion of South Vietnam in early 1975, and the rapid collapse of Saigon in April 1975, ended all hopes for an accounting of American POW/MIAs under the framework of the Paris Peace Accords.<sup>27</sup>

Widespread post-war speculation about the possibility of American POWs still being held in Vietnam helped scuttle any hopes of U.S.-Vietnamese reconciliation and an end to the economic embargo. For example, in May 1981, the *Washington Post* reported that the Central Intelligence Agency (CIA) had mounted an operation in Laos to verify the detainment of twenty to forty American POWs in a prison camp.<sup>28</sup> In the late 1980s, magazines and newspapers published several photos purportedly depicting American POWs still held in captivity in Southeast Asia. Although the U.S. Defense Intelligence Agency proved that the most infamous POW photos, published on the cover of *Time* magazine in 1991, had been clipped from old Soviet magazines, the POW controversy continued.<sup>29</sup> Thousands of "live sighting reports" of American POWs by Vietnamese refugees fueled further allegations of a U.S. government coverup even though virtually all of these reports were determined to be fabrications, correlated to returned POWs, or correlated to non-POWs.<sup>30</sup>

Despite repeated public assurances from U.S. government officials that there was "no credible evidence" that Americans were being held against their will in Southeast Asia, polls in the late 1980s indicated that a majority of the American people believed American POWs still remained alive in Vietnam.<sup>31</sup> Several books were also published alleging that American POWs were left in Southeast Asia.<sup>32</sup> This public perception made it politically impossible for Presidents Reagan and Bush to lift the economic embargo and precluded any meaningful discussion of the issue of compensation for claims of U.S. nationals against Vietnam for expropriated property.

## 2. Vietnam's Military Cooperation with the Soviet Union

Vietnam's close relationship with the former Soviet Union after the fall of Saigon and throughout the 1980s also prevented any rapprochement

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26. *Id.* at 110, 371-72.

27. *Id.* at 153.

28. *Id.*

29. *See id.* at 322-24.

30. *Id.* at 178.

31. *Id.* at iii.

32. *See, e.g.*, NIGEL CAWTHORNE, *THE BAMBOO CAGE* (1991); MONIKA JENSEN-STEVENSON, *KISS THE BOYS GOODBYE: HOW THE UNITED STATES BETRAYED ITS OWN POWS IN VIETNAM* (1990); MARK SAUTER, *THE MEN WE LEFT BEHIND: HENRY KISSINGER, THE POLITICS OF DECEIT AND THE TRAGIC FATE OF POWS AFTER THE VIETNAM WAR* (1993).

between the United States and Vietnam.<sup>33</sup> Large-scale Soviet military, economic, and political assistance to Vietnam during and after the Vietnam War culminated in a 1984 treaty which formalized the alliance between the two nations.<sup>34</sup> In return for its political, economic, and military support of Vietnam during and after the Vietnam War,<sup>35</sup> the Soviet Union gained access to Vietnam's U.S.-built modern naval port facilities at Cam Ranh Bay.<sup>36</sup> Additionally, Soviet military assistance in the years following the Vietnam War enabled Vietnam to maintain a 1.1 million-man army and a foreign occupation force numbering 200,000 troops in Laos and Cambodia.<sup>37</sup> In the context of the bipolar, Cold War climate of the 1980s, close military cooperation between Vietnam and the Soviet Union precluded any reconciliation between Vietnam and the United States.

### 3. *Vietnam's Invasion of Neighboring Cambodia*

Vietnam invaded Cambodia in 1979 and occupied its smaller neighbor throughout the 1980s. This action further stymied any hopes for improved relations with the United States.<sup>38</sup> Vietnam justified its actions in Cambodia on two grounds while alluding to a third. First, it claimed that Khmer Rouge attacks across the Vietnamese border in 1978 justified the invasion. Second, it claimed that the People's Republic of Kampuchea (PRK), installed by Vietnamese forces two weeks after the invasion, had requested the Vietnamese troops to remain. Finally, Vietnam alluded to humanitarian reasons for its intervention, citing the genocide of the Khmer Rouge under Pol Pot.<sup>39</sup> Many nations initially applauded the invasion as a humanitarian effort to topple the barbarous Khmer Rouge, who were responsible for the deaths of as many as two million Cambodians. Eventually, however, some states saw the continued occupation of Cambodia by 150,000 or more Vietnamese troops as an attempt at renewed

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33. For analysis of the U.S.S.R.-Vietnam relationship, see generally ROBERT N. BOUDREAU, *VIETNAM AND THE SOVIET UNION: IMPLICATIONS FOR EUROPE AND AMERICAN FOREIGN POLICY OPTIONS* (1983); ADAM FFORDE, *ECONOMIC ASPECTS OF THE SOVIET-VIETNAMESE RELATIONSHIP* (1984); DOUGLAS E. PIKE, *SOUTHEAST ASIA, THE USSR AND VIETNAM* (1984).

34. U.S.S.R.-Vietnam: Agreement on Long-Term Program for the Development of Economic, Scientific and Technical Cooperation, 23 I.L.M. 659 (1984). Vietnam and the Soviet Union had concluded a Treaty of Friendship & Cooperation in 1978, which clearly tied their security interests. BOUDREAU, *supra* note 33, at 23.

35. According to one authoritative study, Soviet economic and military assistance to Vietnam during the period 1975-1981 reached almost \$9 billion. BOUDREAU, *supra* note 33, at 48.

36. *Id.* The reported price to the Soviet Union of unrestricted access to Cam Ranh Bay and three other U.S.-built bases was a doubling of daily economic aid to Vietnam from \$3 million dollars to \$6 million dollars. *Id.*

37. *Id.* at 55. It is estimated that Soviet troop levels in Vietnam numbered at least 5,000 during the late 1970s and early 1980s. *Id.* at 55-56.

38. See generally *Cambodia After 5 years of Vietnamese Occupation: Hearing and Markup on H. Con. Res. 176 Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. (1983).

39. See GARY J. KLINTWORTH, *VIETNAM'S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW* 10-11 (1989).



Vietnamese hegemony in Southeast Asia.<sup>40</sup> By the late 1980s, many nations had begun to provide arms, money, sanctuary, and political and moral support to one or more of the resistance forces fighting the Vietnamese-backed Cambodian government.<sup>41</sup>

#### 4. *Human Rights Abuses in Vietnam*

Finally, widespread human rights abuses in Vietnam contributed to continued poor relations between the United States and Vietnam through the 1970s and 1980s.<sup>42</sup> Former South Vietnamese military and government officials were persecuted by the victorious North Vietnamese government, and tens of thousands spent many years in brutal "re-education camps."<sup>43</sup> The estimated 50,000-200,000 individuals sent to "re-education camps" after the fall of Saigon generally fell into one of four categories: (1) officers and NCO's of the former South Vietnamese police or military, (2) civil servants of the former South Vietnamese government under Prime Minister Thieu, (3) members of "reactionary" (*i.e.*, democratic) political parties, or (4) professionals such as doctors, lawyers, engineers, and professors.<sup>44</sup>

Other human rights concerns in Vietnam included government censorship of the media and the institution of a one-party political system totally intolerant of any political dissent or criticism.<sup>45</sup>

#### 5. *The Economic Embargo Against Vietnam, 1975-1994*

As a result of Vietnam's recalcitrance on the POW/MIA issue, its close alliance with the Soviet Union, its invasion and occupation of Cambodia, and its dismal human rights record, the United States maintained the wartime economic embargo against Vietnam throughout the 1970s and 1980s. The embargo imposed extremely detailed and comprehensive restrictions on trade and other economic activity related to Vietnam. The most important restrictions prohibited the export to Vietnam of all but humanitarian commodities,<sup>46</sup> the import of all Vietnamese commodities into the United States,<sup>47</sup> the purchasing of Vietnamese merchandise by persons within the United States, the selling or arranging to purchase or sell in a foreign

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40. *Id.* at 3, 7-10.

41. *Id.* at 3.

42. FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, CONGRESSIONAL RESEARCH SERVICE, 95TH CONG., 1ST SESS., *THE STATUS OF HUMAN RIGHTS IN SELECTED COUNTRIES AND THE U.S. RESPONSE 74-76* (Comm. Print 1977) [hereinafter *STATUS OF HUMAN RIGHTS*].

43. Conversations between the author and several former "re-education camp" inmates in Ho Chi Minh City in April 1992 revealed that many of them had been held in the camps for ten years or more depending on their former positions in the South Vietnamese government and their willingness to cooperate with the North Vietnamese regime.

44. *STATUS OF HUMAN RIGHTS*, *supra* note 42, at 75-76.

45. *Id.*

46. 15 C.F.R. § 785.1(a)(ii) (1994) (provision deleted at 59 Fed. Reg. 6524 (1994)).

47. 31 C.F.R. § 500.204 (1994).

country any merchandise to Vietnam,<sup>48</sup> the movement of U.S. documented ships and planes to Vietnam,<sup>49</sup> and the transportation of goods known to be destined for Vietnam in U.S. documented planes or ships.<sup>50</sup>

The trade restrictions precluded virtually all business dealings between U.S. corporations or carriers and the Socialist Republic of Vietnam. Additionally, many Western nations, which might otherwise have provided Vietnam with badly needed economic assistance, were deterred from doing so by the U.S. embargo.<sup>51</sup> The embargo drastically affected the post-war recovery of Vietnam by denying access to technology needed to modernize its infrastructure, develop its manufacturing base, and exploit its agricultural potential.<sup>52</sup> The combination of the U.S. embargo, the collectivization of agriculture in the former South Vietnam, and the disincentives and inefficiencies of the centrally-planned economy imposed on the area of South Vietnam after the war, caused economic production in Vietnam to stagnate in the late 1970s and 1980s.<sup>53</sup>

Perhaps the most severe problem for the post-war Vietnamese economy was hyperinflation as annual rates generally exceeded 100% and even topped 400% in 1985 and 1986.<sup>54</sup> As a result of such inflation and other economic weaknesses, Vietnam's standard of living dropped to among the lowest in the world in the 1980s with a gross national product per capita of approximately \$200.<sup>55</sup>

U.S. corporations also suffered as a result of the embargo. They were

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48. 31 C.F.R. § 505.10 (1994).

49. 44 C.F.R. § 403.1 (1993) (provision deleted at 59 Fed. Reg. 8412 (1994)).

50. 44 C.F.R. § 403.2 (1993) (provision deleted at 59 Fed. Reg. 8412 (1994)).

51. W. Gary Vause, *Doing Business with Vietnam—Prospects and Concerns for the 1990s*, 4 FLA. INT'L L.J. 231, 251 n.123 (1989). One expert has concluded that "so long as [Vietnam was] the target of an embargo by the United States, trade and investment with Vietnam by the West [was] stymied." *Id.* at 287. By contrast, other commentators downplay the influence of the embargo on United States allies, such as Japan, who desire trade relations with Vietnam. As of January 1992 there were at least 75 small Japan-Vietnam joint ventures averaging around \$1 million of investment each. Therefore, limits on investment by various countries may have been more a result of impediments within Vietnam rather than the effect of the U.S. embargo. See Douglas Pike, *Creeping Toward Relations in Southeast Asia*, LEGAL TIMES, Jan. 20, 1992, at 26.

52. See Mya Than & Joseph L.H. Tan, *The Vietnamese Economy in Transition*, in VIETNAM'S DILEMMAS AND OPTIONS: THE CHALLENGE OF ECONOMIC TRANSITION IN THE 1990s 1-4 (Mya Than & Joseph L.H. Tan eds., 1993).

53. See JOEL CHARNEY, OBSTACLES TO RECOVERY IN VIETNAM AND KAMPUCHEA: U.S. EMBARGO OF HUMANITARIAN AID 127 (1984). See generally ADAM FFORDE, THE LIMITS OF NATIONAL LIBERATION: PROBLEMS OF ECONOMIC MANAGEMENT IN THE DEMOCRATIC REPUBLIC OF VIETNAM (1987); ADAM FFORDE, VIETNAM, AN ECONOMY IN TRANSITION (1988); THE ECONOMIC DEVELOPMENT OF VIETNAM IN AN ASIAN PACIFIC PERSPECTIVE (Tran Van Tho ed., 1990); DANG T. TRAN, SOCIALIST ECONOMIC DEVELOPMENT AND THE PROSPECTS FOR ECONOMIC REFORM IN VIET NAM (1991); HOANG K. TRAN, ECONOMY OF VIETNAM: REVIEWS AND STATISTICS (1992); YUANGRAT WEDEL, CURRENT VIETNAMESE ECONOMY (1989).

54. Than & Tan, *supra* note 52, at 4-5.

55. *Id.* at 31. See also *Vietnam's Transition to a Market Economy: Reform Priorities—Foreign Direct Investment*, E. ASIAN EXEC. REP., Dec. 1993, at 9 [hereinafter *Vietnam's Transition*].

denied access to a rapidly growing export market of 70 million people,<sup>56</sup> a well-educated, highly-disciplined workforce,<sup>57</sup> a potentially huge agricultural sector,<sup>58</sup> and abundant natural resources, including offshore deposits of oil and natural gas.<sup>59</sup>

While President Clinton's decision to lift the web of economic restrictions on trade and investment in Vietnam was the first step towards prosperous business relations, Vietnam is far from being an attractive locale for U.S. corporations. For example, Vietnam is not a party to the General Agreement on Tariffs and Trade (GATT) and thus is not required to abide by internationally agreed upon trade rules considered crucial by businesses to long-term profitable trade relations.<sup>60</sup> Furthermore, the U.S. and Association of Southeast Asian Nations (ASEAN) embargoes retarded the development of Vietnamese bilateral and multilateral trade agreements with Western nations and Vietnam's Asian neighbors alike.<sup>61</sup> Before U.S. corporations will invest heavily in Vietnamese industries, the communist government in Hanoi must create a favorable investment and business climate.<sup>62</sup> Despite all the economic uncertainties, however, several hundred foreign corporations have established operations in Vietnam

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56. See JUDITH BANNISTER, VIETNAM POPULATION DYNAMICS AND PROSPECTS xi (1993). Vietnam is the world's thirteenth most populous nation.

57. Vause, *supra* note 51, at 231, 235. See also BANNISTER, *supra* note 56, at 47-51.

58. Arthur J. Dommen, *Potential for Foreign Investors in Vietnam's Agricultural Sector*, E. ASIAN EXEC. REP., July 1992, at 20.

59. Michael J. Scown, *Investing in Vietnam: Oil and Gas Exploration*, E. ASIAN EXEC. REP., Apr. 1992, at 23, 24. Vietnam's petroleum reserves are estimated at nearly 1.5 to 3.0 billion barrels (more than either Australia or Malaysia), and its offshore gas reserves may be as high as 10 trillion cubic feet. *Id.*

60. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188, *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 4th Supp. I (1969).

61. Vause, *supra* note 51, at 251.

62. In recent years, Vietnam has taken significant steps to improve the potential for successful foreign investment. The most significant step was the 1988 Foreign Investment Law which expanded Vietnam's potential for economic cooperation with other nations, promoted domestic economic development through increased exports and exploitation of natural resources, and encouraged broad foreign investment through business cooperation contracts, joint ventures, and wholly foreign-owned enterprises. Vause, *supra* note 51, at 237 & n.28 (citing Law on Foreign Investment in Vietnam, Jan. 1, 1988, English translation in Foreign Broadcast Information Service, Southeast Asia, Jan. 12, 1988, at 47); see also Vause, *supra* note 51, at 254-55; Than & Tan, *supra* note 52, at 7.

Additional regulations supplementing the 1988 Foreign Investment Law have been promulgated almost continuously since 1988 in order to clarify ambiguities and address important issues omitted in the original law. See, e.g., Decree of the Council of Ministers Regulating in Detail the Implementation of the Law of Foreign Investment in Vietnam, (No. 139/HDBT), Sept. 5, 1988, English translation in E. ASIAN EXEC. REP., June 1989, at 25, 30. Issues addressed in the implementing regulations included contractual business cooperation, joint ventures, enterprises with 100% foreign capital, business organization, labor relations, financial matters, foreign exchange control, accounts and audits, customs, immigration, residency, communications, and other issues. Vause, *supra* note 51, at 225-31; see also Than & Tan, *supra* note 52, at 7.

over the last several years.<sup>63</sup>

## B. Prospects for Normalization of Relations

Over the last several years, changes in Vietnam and around the world created a climate where the United States could finally consider lifting the economic embargo and move toward normalization of relations. First, the drastic curtailment of Soviet military activity and support in Vietnam in the late 1980s,<sup>64</sup> and the collapse of the Soviet Union in 1991, permitted the United States to look at its relations with Vietnam in a post-Cold War perspective. Second, the withdrawal of Vietnamese troops from Cambodia in 1990-91, and their replacement with a U.N. peacekeeping force, removed another significant obstacle to improved relations between the former adversaries.<sup>65</sup> Third, respect for human rights improved in Vietnam over the last several years as thousands of former South Vietnamese government officials, who were jailed or sent to re-education camps for several years after the fall of Saigon, were finally released and sometimes permitted to emigrate to the United States.<sup>66</sup>

Most importantly, a thorough U.S. Senate investigation and greatly increased cooperation from Vietnam on the issue of American POW/MIA persuaded the Senate to pass a nonbinding resolution on January 27, 1994, which called for President Clinton to lift the U.S. economic embargo on Vietnam.<sup>67</sup> The Senate established a Select Committee on POW/MIA Affairs in October 1991 to investigate the issue of possible POWs in Vietnam as well as the U.S. government's handling of the issue.

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63. As a result of the codification and continued clarification of its liberal direct foreign investment laws, approved foreign investment in Vietnam rose steadily from 37 projects totaling \$364 million in 1988 to over 200 projects totalling \$1.551 billion in 1991. *Vietnam's Transition*, *supra* note 55, at 8-11. From 1988 through 1994, more than 1,000 direct foreign investment projects in Vietnam had been approved totalling over \$10 billion. Jonathan L. Golin, *Tiger by the Tail*, A.B.A. J., Feb. 1995, at 62. Oil and gas exploration and tourism are the most active foreign investment sectors, and Taiwan (\$785 million), Hong Kong (\$597 million), France (\$453 million), and Australia (\$308 million) are the four largest investors. Two-thirds of the foreign investment projects are in the former South Vietnam where the infrastructure is more developed, western business practices are better understood, and management skills appropriate to a market economy are in greater supply. Of the three types of direct foreign investment permitted in Vietnam—business cooperation contract, Vietnamese-foreign joint venture, or wholly foreign-owned enterprise—joint ventures have constituted a majority of the projects to date. *Vietnam's Transition*, *supra* note 55, at 9-11.

64. See Leszek Buszynski, *The Soviet Union and Vietnamese Withdrawal from Cambodia*, in *VIETNAM'S WITHDRAWAL FROM CAMBODIA* 46 (Gary Klintworth ed., 1990).

65. See Steven R. Ratner, *The United Nations in Cambodia: A Model for Resolution of Internal Conflict?* in *ENFORCING RESTRAINT, COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 241-73 (Lori Fisher & Dan Rosen eds., 1993).

66. *Human Rights in U.S.-Vietnam Relations*, NEWS FROM ASIA WATCH (Asia Watch, New York, N.Y.), Aug. 17, 1993, at 2. This is not to say that human rights conditions in Vietnam are good. Individuals are still detained for political dissent. Freedom of religion is denied and prison conditions are deplorable. *Id.* at 2-10.

67. *Chronology of U.S.-Vietnam Trade Relations, Trade Embargo*, REUTERS, Feb. 3, 1994, available in LEXIS, News Library, Curnws File. The vote in the Senate was 62-38 in favor of the resolution. *Id.*

The Select Committee was comprised of twelve Senators and a professional staff of approximately fifteen individuals. Over a fifteen month period, the Select Committee deposed hundreds of witnesses, reviewed hundreds of thousands of documents, and examined all conceivably relevant POW/MIA intelligence. Members of the Select Committee also made several trips to Southeast Asia and held seventeen days of public hearings in Washington, D.C.<sup>68</sup>

The Select Committee's conclusions were recorded in a 500 page Final Report issued in January 1993.<sup>69</sup> The Select Committee concluded that "[w]hile the Committee has some evidence suggesting the possibility a POW may have survived to the present . . . there is, at this time, no compelling evidence that proves that any American remains alive in captivity in Southeast Asia."<sup>70</sup> The Select Committee also emphatically rejected the contentions that U.S. government officials either knowingly abandoned American POWs in Southeast Asia or conspired or attempted to suppress information showing the existence of American POWs alive in Vietnam after the war.<sup>71</sup> The Select Committee Report left little doubt, however, that Vietnam withheld much available information on the fate of American POWs for over fifteen years after the fall of Saigon.<sup>72</sup>

Cooperation from the Vietnamese on the POW/MIA issue increased substantially during the four or five years before the embargo was lifted. For example, between 1988 and 1993 the Vietnamese returned 112 sets of remains identified as Americans and allowed the United States to establish a POW/MIA Office in Hanoi in April 1991 to help coordinate POW/MIA search efforts.<sup>73</sup> In the last two years alone, Vietnam has permitted the United States to conduct several dozen wartime crash site investigations and excavations throughout the Vietnamese countryside. These investigations and excavations take several weeks and involve dozens of American military and civilian remains recovery personnel from the Joint Task Force for Full Accounting (JTF-FA), established in late 1991 to take advantage of increased U.S. access to crash sites in Vietnam.<sup>74</sup>

As a result of this progress, in July 1993, the Clinton Administration dropped U.S. opposition to World Bank and International Monetary Fund (IMF) lending to Vietnam, and in September 1993, it announced that U.S. companies could bid for contracts in Vietnam financed by such World Bank or IMF loans.<sup>75</sup>

Finally, on February 3, 1994, President Clinton announced the termination of the U.S. economic embargo against Vietnam, effective immedi-

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68. SELECT COMMITTEE REPORT, *supra* note 13, at iii.

69. *Id.*

70. *Id.* at 9.

71. *Id.* at 7, 10.

72. *Id.* at 389.

73. *Id.* at 47.

74. *Lord Testimony*, *supra* note 5.

75. *Id.*

ately.<sup>76</sup> Companies no longer needed to seek approval from the U.S. Department of Commerce to conduct trade with Vietnam or make investments in Vietnamese industries. Within months of the announcement, several U.S. corporations, including Motorola, Caterpillar, Pepsi, Mobil, Coca-Cola, Proctor & Gamble, American Express, IBM, Ford, Chrysler, Otis Elevator, and General Motors had announced plans for major joint ventures or investments in Vietnam.<sup>77</sup> Several U.S. law firms promptly established offices in Vietnam to handle the legal work accompanying the expected rush of business investments.<sup>78</sup> President Clinton's decision to lift the embargo meant that the only remaining hurdle on the path to normalized relations was the issue of compensation of U.S. corporations and individuals for property seized by Communist authorities after the fall of South Vietnam in 1975.

## II. International Law of Compensation for Seized Property

A widely accepted principle of international law is that the taking of the property of an alien, unless accompanied by compensation, is illegal.<sup>79</sup> According to the Restatement (Third) of the Foreign Relations Law of the United States, just compensation "must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken."<sup>80</sup> The Restatement restricts "exceptional circumstances" by

76. Remarks Announcing the End of the Trade Embargo on Vietnam, 30 WEEKLY COMP. PRES. DOC. 205 (Feb. 7, 1994).

77. Louis Beckerling, *Vietnam—The Second U.S. Invasion*, STRAITS TIMES, Feb. 20, 1994, at 1; Golin, *supra* note 63, at 64; Harish Mehta, *Big Wheels Start Rollin' in Vietnam*, BUS. TIMES, Mar. 4, 1994, at 15; Harish Mehta, *The Second American Wave Hits Vietnam*, BUS. TIMES, Feb. 22, 1994, at 15; Harish Mehta, *U.S. Firms Flood Vietnam with Infrastructure Bids*, BUS. TIMES, Feb. 14, 1994, at 3.

78. Golin, *supra* note 63, at 63. Law firms which have already established offices in Vietnam include Baker & McKenzie; Paul, Weiss, Rifkind, Wharton & Garrison; White & Case; Coudert Brothers; Russi & Vecchi; and Skadden, Arps, Slate, Meagher & Flom. *Id.*

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1) (1987):

State Responsibility for Economic Injury to Nationals of Other States

A state is responsible under international law for injury resulting from:

- (1) taking by the state of the property of a national of another state that
  - (a) is not for a public purpose, or
  - (b) is discriminatory, or
  - (c) is not accompanied by provision for just compensation.

For compensation to be just under this subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;

*Id.* See generally S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953).

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1) (1987). The Comments to the Restatement note that, "In exceptional circumstances, some deviation from the standard of equivalent value compensation . . . might satisfy the requirement of just compensation. Whether circumstances are so exceptional as to warrant such deviation, and whether in the circumstances the particular

delineating four characteristics of an expropriation which is not exempt from the general requirement of equivalent value compensation:

A departure from the general rule on the ground of such exceptional circumstances is unwarranted if (i) the property taken had been used in a business enterprise that was specifically authorized or encouraged by the state; (ii) the property was an enterprise taken for operation by the state as a going concern by the state; (iii) the taking program did not apply equally to nationals of the taking state; or (iv) the taking itself was otherwise wrongful under Subsection (a) or (b).<sup>81</sup>

The Reporter's Notes, following the Comments, clarify that nationalizations of investments in natural resources or of going business concerns, which would generate funds from which compensation could be paid, would not constitute "exceptional circumstances" permitting other than full compensation.<sup>82</sup>

The United States and many other countries maintain that a state which takes alien property must provide "prompt, adequate and effective" compensation.<sup>83</sup> Many nations, however, particularly in Latin America and elsewhere in the Third World, have contested the traditional view that "prompt, adequate and effective" compensation requires "full" or "equivalent value" compensation.<sup>84</sup> After the large-scale nationalizations by the Bolsheviks in the Soviet Union in the 1920s, some Western commentators adopted more liberal views on the appropriate compensation standard.<sup>85</sup> The development of more flexible views on just compensation was furthered by the policies of communist and developing countries, who

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deviation satisfies the requirement of just compensation, are questions of international law. . . ." *Id.* at cmt. d.

81. *Id.*

82. *Id.* at rep. note 3.

83. *Id.* at cmt. c. President Ronald Reagan reiterated the traditional U.S. position in a 1983 policy statement:

Under international law, no U.S. investment should be expropriated unless the taking (a) is done for a public purpose; (b) is accomplished under due process of law; (c) is non-discriminatory; (d) does not violate any previous contractual arrangements between the national or company concerned and the government making the expropriation; (e) is accompanied by prompt, adequate, and effective compensation.

Statement of President Ronald Reagan, 19 WEEKLY COMP. PRES. DOC. 1216-18 (Sept. 9, 1983).

84. See, e.g., Francisco Orrego Vicuna, *The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 131-48 (Richard B. Lillich ed., 1975); Brice M. Clagett, *The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?*, 16 LAW & POL'Y INT'L BUS. 813, 876-84 (1984). The traditional view, requiring full (equivalent value) compensation, was originally established in two decisions of the Permanent Court of International Justice in the 1920s. See *Factory at Chorzow*, 1928 P.C.I.J. (ser. A) No. 17; *Case Concerning German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7, at 32.

85. C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22, 24 (1992). For examples of these more liberal views, see Oscar Schachter, *Compensation Cases—Leading and Misleading*, 79 AM. J. INT'L L. 420 (1985); Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984); Burns H. Weston, *The Charter of Economic Rights and Duties of States*

argued that the appropriate compensation to be paid for expropriated property should be determined strictly under the domestic laws of the expropriating state.<sup>86</sup> Not surprisingly, the traditional U.S. view has been contested in the United Nations and other international organizations by states which argue that "full" compensation is not required by international law.<sup>87</sup>

#### A. The U.N. View of Compensation for Seized Property

The U.N. view with respect to the expropriation or seizure of alien property is specifically addressed in two U.N. documents. First, in 1962, General Assembly Resolution 1803, entitled Permanent Sovereignty over Natural Resources,<sup>88</sup> affirmed that a taking of property of foreign nationals required compensation but declared only that the compensation had to be "appropriate."

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases *the owner shall be paid appropriate compensation*, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law*. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.<sup>89</sup>

The United States had proposed the phrase "prompt, adequate and effective" compensation rather than "appropriate," but it voted for the resolution while declaring that, in its view, the terms were synonymous.<sup>90</sup>

A second U.N. document concerning the issue of compensation for expropriated property is General Assembly Resolution 3281, the Charter of Economic Rights and Duties of States (CERDS), article 2.2(c).<sup>91</sup> It was adopted in 1974 by a vote of 120-6 (the six oppositions being the United States, the United Kingdom, the Federal Republic of Germany, Belgium, Denmark, and Luxembourg) with ten abstentions.<sup>92</sup> CERDS provides that

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*and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 453-54 (1981); B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 35 (1959).

86. Amerasinghe, *supra* note 85, at 24. This view requires examination of the taking state's constitution and domestic laws of eminent domain and expropriation to determine what level of compensation, if any, is appropriate. *Id.* at 26-27.

87. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 838 (1991).

88. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5344 (1962) [hereinafter G.A. Res. 1803]. Resolution 1803 passed by a vote of 87-2 with 12 abstentions, with the United States voting in favor. *See* CARTER & TRIMBLE, *supra* note 87, at 838.

89. G.A. Res. 1803, *supra* note 88 (emphasis added).

90. U.N. Doc. A/C.2/S.R. 850, at 327 (1962).

91. G.A. Res. 3281, 29 U.N. GAOR Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251, 255 (1975).

92. Amerasinghe, *supra* note 85, at 33 n.47.



each state has the right

[t]o nationalize, expropriate or transfer ownership of foreign property, in which case *appropriate compensation should be paid* by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.<sup>93</sup>

While the earlier Resolution 1803 (of 1962) refers to international law and seems to support the traditional view of compensation, the CERDS Resolution 3281 (of 1974) supports the view that full compensation is *not* required by international law. CERDS abandoned the earlier U.N. statement that "appropriate" compensation must be made "according to international law" in favor of the principle that compensation is to be determined entirely under the domestic law of the host state.<sup>94</sup>

#### B. What Constitutes "Appropriate" Compensation?

Several recent international arbitrations arising out of Libyan and Iranian expropriations of foreign assets addressed the question of what constitutes "appropriate" or "adequate" compensation. The Iran-U.S. Claims Tribunal consistently required "full" compensation, including lost profits when appropriate, and nothing less.<sup>95</sup> While the tribunal always awarded full compensation, the judges occasionally adverted to the difference of opinion as to whether less than full compensation could still be "just" compensation in the case of lawful *nationalizations* as opposed to discrete *expropriations*.<sup>96</sup>

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93. G.A. Res. 3281, *supra* note 91, at 255 (emphasis added).

94. Amerasinghe, *supra* note 85, at 34.

95. *Id.* at 42. The Iran-U.S. Claims Tribunal was established by the Algiers Accords, which resulted in the release of 52 American hostages seized and held for 444 days in the American Embassy in Tehran, Iran, beginning in November 1979. Declaration of the Government of the Democratic and Popular Government of Algeria, Jan. 19, 1981, 20 I.L.M. 224 (1981); Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 229 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 20 I.L.M. 230 (1981) [hereinafter Algiers Accords]. See generally ALLAHYAR MAURI, *THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL* (1993).

96. The difference between nationalization and expropriation is subtle but significant. In expropriations the state "takes possession of personal, individually held assets and rights of foreigners and usually makes prompt and fair payment for them." Nationalization, by contrast, is a "general, impersonal form of expropriation which the state uses in the larger interests of society to advance a program of economic and social reforms. Its purpose is to have the ownership of wealth and natural resources, as well as the means of production perform a social function." RENATO RIBEIRO, *NATURALIZATION OF FOREIGN PROPERTY IN INTERNATIONAL LAW* i (1977).

The decision by the Iran-U.S. Claims Tribunal in the *SEDCO* arbitration<sup>97</sup> was a valuable precedent for those favoring "full" compensation. In that case, *SEDCO, Inc.*, an American company, sought full ("prompt, adequate and effective") compensation for Iran's seizure of *SEDIRAN*, an ongoing business enterprise, under customary international law and the Treaty of Amity between Iran and the United States which required compensation for the "full equivalent of the property taken."<sup>98</sup> Iran argued that "full" compensation had never been the standard under international law and that customary international law required only "appropriate" compensation in light of all the circumstances of the situation.<sup>99</sup>

The Iran-U.S. Claims Tribunal noted initially that the standard prior to World War II clearly required compensation "equivalent to the full value of the property taken."<sup>100</sup> The Tribunal noted, however, that the common practice of making lump-sum settlements in satisfaction of expropriation claims and the U.N. resolutions discussed earlier have been used as a basis by some nations for arguing that "full" compensation is no longer the standard to be applied.<sup>101</sup> The Tribunal rejected Iran's argu-

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An example of the distinction between nationalization and expropriation was evident in the Iran-U.S. Claims Tribunal decision in *INA Corporation Case*, 8 Iran-U.S. Cl. Trib. Reo. 373, 378 (1985), where the tribunal awarded full compensation to the claimant but noted that, "[i]n the event of such large-scale nationalizations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case." The Chairman of the Iran-U.S. Claims Tribunal examined the debate and concluded that

an application of current principles of international law, as encapsulated in the "appropriate compensation" formula, would in a case of lawful large-scale nationalizations in a state undergoing a process of radical economic restructuring normally require the "fair market value" standard to be discounted in taking account of "all circumstances."

*Id.* at 390. *See also* *American International Group Case*, 4 Iran-U.S. Cl. Trib. Rep. 96, 102-10 (1983) (holding as a general principle of public international law that foreign nationals are entitled to "the value of the property taken" and referring to the need to determine "the going concern or fair market value" of the property).

97. *Interlocutory Award in Case Concerning SEDCO, Inc. and National Iranian Oil Co. and Iran*, 25 I.L.M. 629 (Iran-U.S. Claims Tribunal, May 27, 1986).

98. *Id.* at 631. *SEDCO* argued that full compensation was due under article IV(2) of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran which states:

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Treaty of Amity, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, 903 [hereinafter *Treaty of Amity*].

99. *SEDCO*, 25 I.L.M. at 632.

100. *Id.*

101. *Id.* at 633-34. The tribunal in *SEDCO* noted that the International Court of Justice in *Barcelona Traction*, (*Belg. v. Spain*), 1970 I.C.J. 3, 40 (Feb. 5), rejected the

ment that customary international law no longer required "full" compensation for expropriated property.<sup>102</sup> In doing so the Tribunal emphasized that United Nations General Assembly Resolutions are nonbinding and do not constitute customary international law, although in certain circumstances they may be regarded as evidence of customary international law or contribute to the creation of such law.<sup>103</sup> The Tribunal also concluded that the earlier General Assembly Resolution 1803 (of 1962) more accurately reflects current international law in that it required "appropriate compensation . . . in accordance with international law" and international law at the time required full compensation.<sup>104</sup> Thus, Iran was required to compensate SEDCO for the full value of the expropriated property under both customary international law and the Treaty of Amity.<sup>105</sup>

In addition to the U.N. resolutions and international arbitrations discussed earlier, U.S. courts have also ruled on what constitutes "just" or "adequate" compensation for expropriated property. One of the more significant recent decisions is *Banco Nacional de Cuba v. Chase Manhattan Bank*.<sup>106</sup> In *Banco Nacional*, the Second Circuit Court of Appeals rejected "going concern" value (including lost profits) and awarded a lesser "net book value" compensation for the nationalized Cuban branches of a U.S. bank because the business did not qualify as a "going concern" at the time of expropriation.<sup>107</sup> Although it awarded close to what it considered both "appropriate" and "full" compensation, the court did not rule out the possibility that less than full compensation might be acceptable under international law in certain cases of expropriation:

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significance of such "lump-sum" settlements as evidence of a deviation from the full compensation standard in customary international law for the expropriation of alien property. *SEDCO*, 25 I.L.M. at 633. At least one commentator has argued, however, that the *SEDCO* tribunal was mistaken when it referred to *Barcelona Traction* as rejecting the significance of lump-sum payments as evidence of emerging international law. Amerasinghe, *supra* note 85, at 29. This commentator interprets the *Barcelona Traction* court to have said only that while lump-sum settlement agreements for less than full value of seized alien property could be evidence of emerging customary international law, such settlements were in actuality so varied as to the classes of beneficiaries of compensation "that they could not be evidence of a consistent practice evidencing a norm relating to such beneficiaries." *Id.*

102. *SEDCO*, 25 I.L.M. at 635.

103. *Id.* at 633-34. For additional support of the view that United Nations General Assembly Resolutions, while sometimes considered as evidence of international law, are not authoritative or binding as international law, see CARTER & TRIMBLE, *supra* note 87, at 114-21. See also Amerasinghe, *supra* note 85, at 34 n.48 and sources cited therein.

104. *SEDCO*, 25 I.L.M. at 634 (quoting U.N. General Assembly Res. 1803). One commentator argues that since CERDS was attempting to define a new international economic order and create and promote certain economic conditions and relations among states, the Resolution did not reflect the status of existing international law but rather a prospective international economic order aspired to but not yet achieved. Amerasinghe, *supra* note 85, at 35.

105. *SEDCO*, 25 I.L.M. at 635-36. See also *Tippets v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1989) (stating that the standard of compensation is "the full value" of the property of which the claimant was deprived).

106. 658 F.2d 875 (2d Cir. 1981).

107. *Id.* at 892-94.

It may well be the consensus of nations that full compensation need not be paid "in all circumstances". . . and that requiring an expropriating state to pay "appropriate compensation,"—even considering the lack of precise definition of that term,—would come closest to reflecting what international law requires. But the adoption of an "appropriate compensation" requirement would not exclude the possibility that in some cases full compensation would be appropriate. We see no reason why the two standards may not overlap. . . .<sup>108</sup>

The admission of the *Banco Nacional* court that less than "full" compensation might be acceptable in some circumstances is consistent with the Restatement's "exceptional circumstances" provisions.<sup>109</sup>

The domestic analogue to the dispute over "full" versus "appropriate" compensation is found in the Supreme Court's public takings jurisprudence. Like the Restatement, which requires "just" compensation for the taking of the property of a national of another state,<sup>110</sup> the Fifth Amendment to the U.S. Constitution requires "just" compensation for public takings of private property.<sup>111</sup> In interpreting "just" compensation, the Court "has been careful not to reduce the concept . . . to a formula"<sup>112</sup> or to "prescribe a rigid rule."<sup>113</sup> Nevertheless, the Court has normally accepted "fair market value" as a just standard.<sup>114</sup>

Since "fair market value" cannot be considered less than "full" value, it seems evident that "full" compensation is the rule in interpreting "just" compensation under the Fifth Amendment, with a narrow exception for circumstances when "fair market value" cannot be determined.<sup>115</sup>

### C. Appropriate Compensation for "Unlawful" Takings

Amidst the debate over what constitutes "just" compensation for the expropriation of alien property, the distinction between the level of compensation for *unlawful* takings under international law, as opposed to compensation for lawful takings, is often forgotten:

It is important in all cases to distinguish between unlawful takings of property and lawful takings. In the former what is due is damages. In the latter the alien must be compensated. There is clearly a distinction between the

108. *Id.* at 892 (footnotes and citation omitted).

109. *See supra* note 80 and accompanying text.

110. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1) (1987).

111. "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

112. *United States v. Cors*, 337 U.S. 325, 332 (1949).

113. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

114. *Id.* *See Olson v. United States*, 292 U.S. 246, 255 (1934) (explaining that for purposes of the Fifth Amendment, just compensation is normally measured by "the market value of the property at the time of the taking."), *reaffirmed in United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

115. This is not to say that only "fair market value" is acceptable as "just" compensation. The Supreme Court has indicated that when "market value has been too difficult to find, or when its application would result in manifest injustice to owner or public" courts are free to fashion or apply other standards of compensation. *Commodities Trading Corp.*, 339 U.S. at 123.

two cases, damages being naturally usually heavier than compensation. . . . It is particularly with respect to the element of *lucrum cessans* [future profits] that the two situations differ, though there may be divergences even in respect of *damnum emergens* [actual damages].<sup>116</sup>

For example, in *Texaco Overseas Petroleum v. Libya*,<sup>117</sup> the international arbitrator held that the taking of property by Libya (by way of legislative cancellation of a contract containing a stabilization clause) was unlawful under international law and thus required *restitutio in integrum* or "full restitution."<sup>118</sup> This decision demonstrates that when the nationalization or expropriation itself violates international law, the offending party is subject to damages potentially greater than the amount of the "just" or "adequate" compensation due for otherwise "lawful" takings.

Although the compensation standard under international law for expropriation has not been fully clarified, several principles do emerge upon careful analysis. First, while discrete expropriations of property clearly require "full" compensation in the sense of equivalent value, under special circumstances, a court may award less than full compensation.<sup>119</sup> Second, following unlawful nationalizations or expropriations, courts may award damages exceeding the value of "just" compensation.<sup>120</sup> Third, there is no international uniformity in the approaches to valuation of different types of expropriated property or interests.<sup>121</sup>

### III. The U.S. Foreign Claims Settlement Commission (FCSC)

#### A. The History and Purpose of the FCSC

In 1954, President Eisenhower established the U.S. Foreign Claims Settlement Commission as a semipermanent independent government organization<sup>122</sup> by transferring to it the functions of the War Claims Commission and the International Claims Commission.<sup>123</sup> The mission of the FCSC, according to former Chairman of the Commission Stanley J. Glod,<sup>124</sup> is the "adjudication of claims of American citizens, corporations and other legally constituted entities against foreign governments for the nationalization, expropriation or other uncompensated taking of their property and/

116. Amerasinghe, *supra* note 85, at 37-38.

117. 17 I.L.M. 1 (1978).

118. *Id.* at 36.

119. See *supra* notes 80-82 and accompanying text.

120. See *supra* notes 116-18 and accompanying text.

121. Amerasinghe, *supra* note 85, at 57-62.

122. The Commission was created by the President's Reorganization Plan No. 1 of 1954, 68 Stat. 1279, reprinted in 5 U.S.C. app. at 1291 (1988).

123. Stanley J. Glod, *The Foreign Claims Settlement Commission of the United States: Resolution of International Claims in the Nineties and Beyond*, 37 FED. BAR NEWS & J. 140 (1990). In 1980, the FCSC was transferred to the Department of Justice as a separate agency of that Department. Act of Mar. 14, 1980, Pub. L. No. 96-209, 94 Stat. 96 (codified as amended at 22 U.S.C. § 1622a (1988)).

124. The leadership of the FCSC is comprised of a Chairman and two Commissioners who are appointed by the President and who must be confirmed by the Senate. Glod, *supra* note 123, at 140.

or interests, losses or injuries sustained by them."<sup>125</sup> While the FCSC determines the validity and value of claims of U.S. citizens and corporations, the awards it makes are not actually paid to claimants until compensation is received from the offending nation. It is the responsibility of the Executive Branch, through the Department of State, to negotiate with foreign governments for the settlement of U.S. citizens' claims.<sup>126</sup> Payment from the offending country can come either prior to the FCSC's adjudication of claims<sup>127</sup> or after.<sup>128</sup>

Congress granted the FCSC the authority to adjudicate these claims through enabling legislation in the form of Amendments (Titles) to the International Claims Settlement Act (ICSA) of 1949.<sup>129</sup> The decisions of the FCSC are final and conclusive on questions of law and fact surrounding claims and are not subject to review or appeal to any other government agency or court of law.<sup>130</sup>

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125. *Id.*

126. An injured individual has no legally enforceable right against his own government, however, to compel it to press a claim diplomatically against a foreign state. *Redpath v. Kissinger*, 415 F. Supp. 566, 569 (W.D. Tex. 1976), *aff'd*, 545 F.2d 167 (5th Cir. 1976).

127. See James H. Grossman & David M. Frost, *Foreign Claims Settlement Commission of the United States—A Paradigm for International Claims Resolution*, 21 INT'L BUS. LAW. 276, 276-77 (1993). Under this type of agreement the government in question pays a lump-sum of money as settlement for all pending claims by United States nationals against that government. A fund is then established in the United States Treasury, and the FCSC authorizes awards from that fund to meritorious claims. The claims programs against Egypt, Yugoslavia, and Iran all used this type of claims settlement procedure. *Id.*

128. *Id.* In this type, called pre-adjudication, the FCSC obtains enabling legislation from Congress and then receives and adjudicates the validity of claims in anticipation of a future settlement agreement between the United States and the offending government. The advantage of this procedure is that it allows for adjudication while the evidence and memories of claimants is still relatively fresh. This form of pre-adjudication was used in the case of claims against Cuba, the German Democratic Republic (East Germany), and Vietnam. *Id.*

129. International Claims Settlement Act of 1949 (ICSA), Pub. L. No. 81-455, 64 Stat. 13 (1950) (codified as amended at 22 U.S.C. §§ 1621-1645o (1988)). Congress may defer to institutions other than the FCSC, such as the Iran-U.S. Claims Tribunal, to adjudicate claims of Americans. See generally JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1991); Norbert Wühler, *The Iran-United States Claims Tribunal*, J. INT'L ARB., Dec. 1991, at 5.

Likewise, the United Nations Compensation Commission was established to adjudicate claims arising from the Iraqi invasion and occupation of Kuwait in 1990-91. See generally Bachir G. Affaki, *The United Nations Compensation Commission: A New Era in Claims Settlements?*, J. INT'L ARB., Sept. 1993, at 21; Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421 (1992); Massimo Galli, *Sue or Lose: An Agenda for American Corporations and Companies Seeking Compensation From Iraq*, 1993 COLUM. BUS. L. REV. 241 (1993); Nicolas C. Ülmer, *The Gulf War Claims Institution*, J. INT'L ARB., Mar. 1993, at 85.

130. Grossman & Frost, *supra* note 127, at 277. A claimant who disagrees with the FCSC's initial disposition of his or her claim is nevertheless entitled to have the FCSC reconsider its initial decision at an oral hearing where new evidence or arguments may be entered before a final decision is made. *Id.*

## B. Previous Claims Programs of the FCSC

Since its inception, the FCSC (and its two predecessor commissions) have adjudicated forty claims programs involving over 660,000 claims against sixteen nations.<sup>131</sup> It has granted over \$3 billion in awards.<sup>132</sup> Claims adjudicated by the FCSC range in scope from losses suffered by the repudiation of Czarist Russian bonds held by U.S. citizens to awards for torture and physical deprivation of American POWs during World War II and the Korean and Vietnam Wars.<sup>133</sup> There is no limit to the number of claims or dollar value of claims the FCSC has authority to adjudicate.

In 1980, Congress passed Title VII of the International Claims Settlement Act,<sup>134</sup> which authorized the FCSC to consider and value the claims of U.S. nationals against Vietnam for the seizure of property after April 29, 1975.<sup>135</sup> The purpose of Title VII was

to provide for the determination of the validity and amounts of outstanding claims against Vietnam which arose out of the nationalization, expropriation, or other taking of (or special measures directed against) property of nationals of the United States. This title shall not be construed as authorizing or as any intention to authorize an appropriation by [the Congress of] the United States for the purpose of paying such claims.<sup>136</sup>

Title VII required that the FCSC adjudicate the claims of nationals of the United States against Vietnam in "accordance with applicable substantive law, including international law."<sup>137</sup> This means that the FCSC was obligated to apply the standards of compensation for expropriated property as mandated by international law.

## IV. U.S. Citizens' Claims Against Vietnam

Between 1980 and 1986 the FCSC heard 534 claims against Vietnam for expropriated property of U.S. citizens and corporations, and it granted awards in 192 of those claims.<sup>138</sup> The awards amounted to \$99,471,983.51 in principal, with interest to be compounded to each award at the rate of 6% per year from the date of loss until the date of payment.<sup>139</sup> Govern-

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131. Glod, *supra* note 123, at 140. A claims program brings together for adjudication all U.S. citizens' or corporations' claims against a particular country arising out of a nationalization or expropriation undertaken by that country within a statutorily specified period of time. Previous claims programs have been adjudicated against Yugoslavia, Panama, Bulgaria, Hungary, Romania, Italy, the Soviet Union, Czechoslovakia, Poland, Cuba, the People's Republic of China, the German Democratic Republic (East Germany), Ethiopia, Iran, Egypt and Vietnam. *Id.*

132. *Id.*

133. *Id.* at 141.

134. Act of Dec. 28, 1980, Pub. L. No. 96-606, 94 Stat. 3534 (codified as amended at 22 U.S.C. §§ 1645-1645 (1988)); International Claims Settlement Act of 1949 (ICSA), Pub. L. No. 81-455, 64 Stat. 12 (1950) (codified as amended at 22 U.S.C. §§ 1621-1645 (1988)).

135. *Id.*

136. 22 U.S.C. § 1645.

137. 22 U.S.C. § 1645b.

138. Brown, *supra* note 3, at 101.

139. *Id.*

ment officials recently estimated that the value of the private claims adjudicated by the FCSC totaled, with interest added, \$230-250 million.<sup>140</sup> These claims range in size from a pre-interest award of \$35.1 million granted to Exxon Corporation for gas stations, vehicles, and oil exploration equipment to the \$171.66 awarded to Joseph Sturgeon, Jr. for the balance left in a Saigon bank seized by Communist authorities after the war.<sup>141</sup>

## A. Eligibility, Compensability, and Valuation of Claims

### 1. Eligibility

To be eligible for compensation under the Vietnam Claims Program (Title VII), a claimant had the burden of proving the elements of a valid claim.<sup>142</sup> First, the claim could be entertained only if the property seized was owned by a national of the United States or a corporation at least fifty percent owned by nationals of the United States at the time of the nationalization, expropriation, or other taking.<sup>143</sup> The claim also must have been held continuously by U.S. nationals or corporations from the date of loss until the filing of the claim with the FCSC.<sup>144</sup>

### 2. Compensability

Second, the claimant must have had a compensable claim under the enabling statute and international law. Compensable claims under the enabling statute were those claims "arising on or after April 29, 1975, for losses incurred as a result of the nationalization, expropriation, or other taking of (or special measures directed against) property" of nationals or corporations of the United States.<sup>145</sup>

140. *U.S. Relations with Vietnam: Hearings Before the Subcomm. on East Asian and Pacific Affairs of the Sen. Foreign Relations Comm.*, 103d Cong., 2d Sess. (1994) (testimony of Mr. R. Richard Newcomb, Director of Foreign Asset Control, Department of Treasury).

141. Bob Deans, *U.S. Wants Hanoi to Repay Losses*, PHOENIX GAZETTE, Feb. 11, 1994, at A19.

142. 45 C.F.R. § 531.6(d) (1993) ("The claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his or her claim.").

143. The enabling statute, 22 U.S.C. § 1645a(1), defined "national of the United States" as:

- (A) a natural person who is a citizen of the United States; and
- (B) a corporation or other legal entity which is organized under the laws of the United States or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

*Id.*

144. 22 U.S.C. § 1645c. The requirement that the claim be continuously held by a U.S. national was the basis of rejection for over 50% of all claims filed with the FCSC. Brown, *supra* note 3, at 110.

145. 22 U.S.C. § 1645b. The term "property" was defined as "(A) any property, right, or interest, including any leasehold interest, (B) any debt owed by Vietnam or by any enterprise which has been nationalized, expropriated, or otherwise taken by Vietnam, and (C) any debt which is a charge on property which has been nationalized, expropriated, or otherwise taken by Vietnam." 22 U.S.C. § 1645a(3).



The compensability of a claim under international law was determined according to the individual facts of the claim and precedent established by international tribunals, as discussed *supra*. However, the FCSC made several rather controversial decisions that facilitated favorable adjudications of claims against Vietnam. First, the FCSC allowed claimants to prove ownership at the time of loss by the "secondary evidence rule."<sup>146</sup> This rule allowed claimants to prove ownership through detailed lists, affidavits, corporate financial statements, and other unofficial records, including photographs.<sup>147</sup> Second, the FCSC determined that the official policy of the victorious Communist government was to take control of all the property belonging to Americans and South Vietnamese who fled the country in April 1973.<sup>148</sup> This determination allowed individuals who were unsure what had happened to their property after they fled Vietnam to overcome successfully the statutory burden of proving their property was actually taken by Vietnamese government authorities.<sup>149</sup> Third, the FCSC determined that all bank accounts in Vietnam were effectively taken on May 1, 1975, when the Communist authorities announced their confiscation and instituted strict controls over withdrawals of bank funds.<sup>150</sup>

### 3. Valuation

The third aspect of foreign claims adjudication, after the eligibility of the claimant and the compensability of the claim have been decided, is the valuation of the claim. "Property valuation by the Commission prior to settlement negotiations," notes one commentator, "enables the United States to assert unilaterally its own evaluation of what would constitute adequate and effective compensation in each case."<sup>151</sup> Title VII granted the FCSC the authority to determine the value of each Vietnam claim "in accordance with applicable substantive law, including international law."<sup>152</sup> Title V of the ICSA, which authorized the Cuba and China claims programs, included additional instructions on the valuation of claims. These instructions required the FCSC to "take into account . . . (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement."<sup>153</sup> Because Title VII did not include the same four valua-

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146. Brown, *supra* note 3, at 105.

147. See, e.g., Claim of R.G. Westervelt, Claim No. V-0088, Dec. No. V-0312, at 2 (FCSC Aug. 13, 1985) (where the claimant's only evidence of ownership was "a four-page listing of the property giving a description and cost and date of purchase of each item").

148. See, e.g., Claim of Betty Janet Mitchell, Claim No. V-0358, Dec. No. V-0259, at 2-3 (FCSC Mar. 11, 1985).

149. See 45 C.F.R. § 531.6(d) (1993).

150. See, e.g., Claim of The Pearl S. Buck Foundation, Claim No. V-0261, Dec. No. V-0439 (FCSC Oct. 15, 1985) (holding that the claimant, a non-profit corporation, was entitled to compensation for the loss of two accounts held in the Saigon branch of the Chase Manhattan Bank).

151. Brown, *supra* note 3, at 120.

152. 22 U.S.C. § 1645b.

153. 22 U.S.C. § 1643b(a).

tion techniques, the FCSC determined it was not bound by Title V.<sup>154</sup> Nevertheless, the FCSC utilized the Cuba and China claims valuation techniques as precedent for its Vietnam claims program valuations.<sup>155</sup>

In adjudicating the Vietnam claims, the FCSC used four types of property valuation principles and techniques.<sup>156</sup> Personal property was valued by taking the purchase price and calculating its value in 1975 according to a specific depreciation schedule.<sup>157</sup> Real property was valued by awarding either the property's appraised value or its purchase price plus the cost of substantiated improvements and an allowance for appreciation.<sup>158</sup> Oil concessions were valued at the cost of the fees paid for the concessions plus capitalized expenditures.<sup>159</sup> No awards were made for the loss of prospective earnings from unproven oil reserves because such prospective earnings were incapable of accurate measurement.<sup>160</sup>

Business interests seized as "going concerns" were entitled to lost future profits under international law.<sup>161</sup> The FCSC had also previously recognized that lost profits "should be considered" if they could be proven with some certainty.<sup>162</sup> Nevertheless, only two Vietnam claimants were

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154. Brown, *supra* note 3, at 122.

155. *Id.* at 121-22.

156. For a detailed explanation of the different methods used to value interests and property in foreign claims adjudication, see Amerasinghe, *supra* note 85, at 50-51 n.102; see also Dale R. Weigel & Burns H. Weston, *Valuation upon the Deprivation of Foreign Enterprise: A Policy Oriented Approach to the Problem of Compensation Under International Law in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 3, 16-23 (Richard B. Lillich ed., 1972).

157. See, e.g., Claim of Russell Theodore Delong, Claim No. V-0161, Dec. No. V-0374, at 3 (FCSC July 1, 1985). For example, art objects and other valuables such as silver and jewelry were not depreciated while clothing was depreciated at 20% per year. All other household and personal objects were depreciated at 5% per year. Brown, *supra* note 3, at 122 n.138.

158. See, e.g., Claim of Thu Dunton & Lyman L. Dunton, Claim No. V-0526, Dec. No. V-0495, at 2 (FCSC Oct. 15, 1985) (where the FCSC awarded \$4,000 for a house valued at \$3,500 from bank account records).

159. See Claim of Ameranda Hess Corp. of Vietnam, Claim No. V-0247, Dec. No. V-0427, at 6 (FCSC Nov. 19, 1985). "Capitalized expenditures" included items such as the cost of geological and seismic studies while outlays for "ordinary administrative costs," such as the drilling of dry holes, were considered routine business costs that did not "rise to the level of compensable property." Claim of Joint Venture of Pecten Vietnam Co. & Vietnam Cities Serv., Inc., Claim No. V-0522, Dec. No. V-0425, at 3, 11 (FCSC Nov. 19, 1985).

160. Brown, *supra* note 3, at 127; see, e.g., Claim of Esso Exploration & Production Vietnam, Inc., Claim No. V-0236, Dec. No. V-0436, at 4 (FCSC Aug. 13, 1985).

161. See Brice M. Clagett, *The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?*, 16 LAW & POL'Y INT'L BUS. 813, 839 (1984); Henry T.C. Hu, *Compensation in Expropriations: A Preliminary Economic Analysis*, 20 VA. J. INT'L L. 61, 68 (1979); Richard J. Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND J. TRANSNAT'L L. 517, 519 (1976). "The most appropriate method of measuring 'going concern value' is by discounting or capitalizing the reasonably ascertainable future earnings of the business." Brown, *supra* note 3, at 130.

162. Brown, *supra* note 3, at 130. In the Claim of First Nat'l Bank of Boston, Claim No. CU-2268, Dec. No. CU-3071 (FCSC Feb. 26, 1969), the FCSC determined that where a bank had lost six branch offices as a result of Cuba's nationalization of the banking industry, "the nature of the business conducted is such that earnings potential

able to obtain an award approximating lost future profits.<sup>163</sup> The remaining lost business claims were valued according to "book value" of the business.<sup>164</sup> The FCSC claimed it was not bound to award lost profits because there was no specific legislative directive to do so (as there was in Title V), and the Second Circuit had rejected the appropriateness of lost profits under international law under circumstances similar to those faced by claimants before the FCSC.<sup>165</sup> Congress subsequently rejected the FCSC's position and amended the ICSA to require "going concern value" as a viable and acceptable valuation approach in all future foreign claims adjudications.<sup>166</sup>

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. . . is of greater significance than asset value in the determination of true value of the enterprise at any given time." *Id.* at 4.

163. Brown, *supra* note 3, at 131; see Claim of George D. Yaron, Claim No. V-0006, Dec. No. V-0424, at 4 (FCSC Jan. 22, 1986); Claim of American Int'l Group, Claim No. V-0330, Dec. No. V-0404 (FCSC Jan. 22, 1986).

164. Brown, *supra* note 3, at 131-39. Book value has often been criticized as the least acceptable method for valuation of expropriated property because it yields a figure "which in most cases bears little relationship to actual value." Smith, *supra* note 161, at 519. To determine book value, also known as "net asset value" or "net worth," the FCSC closely examined balance sheets as of the date of nationalization. Liquid assets such as bank accounts, inventories, and cash reserves were included in the net worth computation. See Claim of Esso Eastern, Inc., Claim No. V-0235, Dec. No. V-0438, at 4-5 (FCSC Aug. 13, 1985). Where the nationalized business was a subsidiary of a U.S. corporation, the FCSC excluded from total assets the accounts receivable from the U.S. parent on the assumption that they were never paid by the claimant. See Claim of American Trading Co., Inc., Claim No. V-0042, Dec. No. V-0415, at 4 (FCSC Aug. 13, 1985). Pre-operation and formation costs were included as assets to the extent that they constituted "capitalized expenditures" under generally accepted accounting principles. See Claim of Frank H. Hopkins, Claim No. V-0185, Dec. No. V-0471, Supp. Final Dec. at 8-9 (FCSC Feb. 25, 1986).

On the liabilities side of the ledger, accounts payable to a U.S. parent corporation were excluded on the theory that accounts payable were debts taken on by Vietnam at the time of the nationalization. See Claim of American Trading Co., Inc., Claim No. V-0042, Dec. No. V-0415, at 4 (FCSC Aug. 13, 1985). Notes payable and other accounts representing paid-in capital of a U.S. national owner were similarly excluded from the net asset value computation. See, e.g., Claim of Frank H. Hopkins, Claim No. V-0185, Dec. No. V-0471, Proposed Dec. at 4 (FCSC Aug. 27, 1985).

165. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 894 (2d Cir. 1981) (holding that Chase was not entitled to going concern value for the loss of its branches nationalized in Cuba where "many of Chase's actual or potential customers had or were about to have their own business nationalized . . . and . . . the government would soon decree that those who remained carry on their banking transactions only with government-owned banks").

166. Pub. L. No. 99-451, 100 Stat. 1138 (1986), amending 22 U.S.C. § 1623(a).

Fair market value shall be ascertained in accordance with the method most appropriate to the property taken and equitable to the claimant, including—

- (i) market value of outstanding equity securities;
- (ii) replacement value;
- (iii) *going-concern value (which includes consideration of an enterprise's profitability)*; and
- (iv) book value.

In the case of any claim for losses in a service industry, the appropriate basis of valuation shall be presumed to be that referred to in clause (iii).

*Id.* (emphasis added). See also Brown, *supra* note 3, at 135-36.

## B. U.S. Government Claims Against Vietnam

Other claims against Vietnam existed in addition to the claims of U.S. citizens and corporations adjudicated by the FCSC under Title VII of the ICSCA. For example, the U.S. government lost millions of dollars in military equipment, aircraft, buildings, and other items when it abandoned South Vietnam on April 30, 1975.<sup>167</sup> The value of U.S. government property seized by the communist authorities has never been accurately determined.<sup>168</sup> One source has reported that the value of the U.S. government's expropriated property claims totals about \$250 million, excluding claims for lost military equipment.<sup>169</sup>

Under the War Claims Act of 1948,<sup>170</sup> the FCSC is also authorized to adjudicate claims of former U.S. prisoners-of-war<sup>171</sup> and civilian internees,<sup>172</sup> captured and interred by hostile forces in Southeast Asia during the Vietnam conflict, for inadequate rations and inhumane treatment while in captured status. Through early 1990, the FCSC had granted \$5,347,773 in awards to 736 former prisoners-of-war or their survivors<sup>173</sup> and \$229,337 in awards to forty-one civilian internees.<sup>174</sup> Payment of the awards made by the FCSC to Americans held prisoner during the Korean and Vietnam Wars have already been made with funds appropriated by Congress.<sup>175</sup>

## V. Satisfaction of Claims Against Vietnam

The claims adjudication process conducted by the FCSC did not conclude the process of gaining restitution for U.S. property seized by Vietnam. President Clinton's decision to present the claims of U.S. citizens for compensation was entirely dependent on the domestic law of the United States and the foreign policy considerations of the President and Congress.<sup>176</sup>

### A. Full Satisfaction of Claims

International law entitled U.S. nationals to "just" compensation for their expropriated property in Vietnam.<sup>177</sup> In this instance, "just" compensation equalled "full" compensation for three reasons. First, the taking of

167. Vause, *supra* note 51, at 239.

168. *POW/MIA: After the Embargo, Hearing Before the Subcomm. on Asia and the Pacific of the House Foreign Affairs Comm.*, 103d Cong., 2d Sess. (1994) (statement of Robert G. Torricelli (D-NJ)).

169. *See Settlement of American Claims Against Vietnamese Assets*, BUS. ASIA, Aug. 16, 1993.

170. 50 U.S.C. app. §§ 2001-17 (1988).

171. 50 U.S.C. app. § 2005(f) (1988).

172. 50 U.S.C. app. § 2004(i) (1988).

173. Glod, *supra* note 123, at 141.

174. *Id.*

175. Grossman & Frost, *supra* note 127, at 277.

176. 6 J.B. MOORE, *INTERNATIONAL LAW* 616 (1906). Brown, *supra* note 3, at 140 n.232 (citing *Redpath v. Kissinger*, 415 F. Supp. 566, 569 (W.D. Tex. 1976), *aff'd* 545 F.2d 167 (5th Cir. 1976) (stating that "an injured individual has no legally enforceable right against his own government to compel it to press a claim diplomatically against a foreign state").

177. *See* discussion, *supra* notes 79-80 and accompanying text.

American property would not constitute "exceptional circumstances" as that term is defined in the Restatement or in decisions of international tribunals.<sup>178</sup> Second, the Communist North Vietnamese authorities' expropriation of American property after the fall of South Vietnam was not a lawful taking because the invasion which led to the taking violated the Paris Peace Accords<sup>179</sup> and the U.N. Charter.<sup>180</sup> Thus, the claimants would be entitled to damages which are "naturally usually heavier than compensation."<sup>181</sup> Third, the takings by Vietnam after April 29, 1975 were of the same character (though far fewer in number and of much lesser value) as those of Iran after the Iranian Revolution in 1979, yet the Iran-U.S. Claims Tribunal found no "exceptional circumstances" allowing for less than "full" compensation.<sup>182</sup> Consequently, Vietnam should be required to pay "full" compensation for the claims of U.S. citizens.

### 1. "Exceptional Circumstances" Exception

The seizure of virtually all private property and industry by Communist authorities after the fall of South Vietnam on April 30, 1975 might seem initially like the "exceptional circumstances" which the Restatement, several recent international arbitrations, and U.S. court decisions have indicated permit deviation from the standard of "full" compensation. The Vietnam expropriations were full-scale seizures of the property of fleeing American nationals. On May 1, 1975, the day after Saigon fell to North Vietnamese forces, Communist authorities in South Vietnam issued a decree declaring that "all . . . industrial, agricultural and commercial establishments, banks, communication and transport, cultural, educational and health establishments, warehouses . . . together with documents, files, property and technical means of U.S. imperialism . . . will be confiscated, and from now on, managed by the revolutionary administration."<sup>183</sup> While not all industries and property of American or South Vietnamese citizens were immediately seized,<sup>184</sup> Vietnam did attempt to institute a collectivized agricultural system and circumscribed the private ownership of real property.<sup>185</sup> Likewise, all major industries, including banking, transportation, health, and education were subsequently

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178. See discussion, *supra* notes 80-82 and accompanying text.

179. See Paris Peace Accords, *supra* note 10, art. 7.

180. U.N. CHARTER art. 2, ¶4.

181. See discussion, *supra* notes 116-18 and accompanying text.

182. See discussion, *supra* notes 95-105 and accompanying text. See also ALLAHYAN DOURI, *THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL* 363-90 (1993).

183. Communique No. 3 of the Saigon-Gia Dinh City Military Management Committee, FBIS, Daily Report: Asia and Pacific (NTIS) L-2, L-3 (May 1, 1975) (*quoted in Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 857 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)).

184. See, e.g., Claim of Ly Thi Vianzon, Claim No. V-0474, Dec. No. V-0351, at 1 (FCSC Jan. 22, 1986) (where claimant was not able to prove that her house in Saigon had been taken on August 1, 1978).

185. See VO NHAN TRI, *VIETNAM'S ECONOMIC POLICY SINCE 1975* at 75-85 (1990); ADAM FFORDE & STEFAN DE VYLDER, *VIETNAM—AN ECONOMY IN TRANSITION* 61-64 (1988).

nationalized.<sup>186</sup>

Such full-scale expropriations, some might argue, fall under the "exceptional circumstances" exception incorporated in the Restatement. However, the Restatement also indicates that a departure from the general rule of full compensation is not warranted if the property taken "was an enterprise taken for operation by the state as a going concern."<sup>187</sup> Additionally, the Reporter's Notes clarify that nationalizations of investments in natural resources (such as oil concessions) or of going business concerns, which would generate funds from which compensation could be paid, would not constitute exceptional circumstances permitting other than full compensation.<sup>188</sup> Therefore, any property, investments, or enterprises seized by Vietnam which were taken in order to be operated or used for production by the Vietnamese government, rather than for redistribution among the landless poor as in the case of agrarian reform, would require "full" compensation under the Restatement's approach. Because over ninety-two percent of the value of the FCSC's awards to U.S. claimants were made to twenty-one corporate claimants,<sup>189</sup> whose businesses were seized or whose investments were nullified, full compensation out of the operation of these going concerns is possible, and the "exceptional circumstances" deviation from full compensation is therefore not warranted under international law.

## 2. *Takings in Violation of International Law*

Full compensation is also justified under international law because the taking of American property by Communist Vietnamese authorities was accomplished illegally through the use of unlawful force of arms. The North Vietnamese invasion of South Vietnam in the spring of 1975 violated basic non-aggression principles of international law and article 2 of the U.N. Charter.<sup>190</sup> The North Vietnamese invasion also violated the specific non-aggression provisions of the Paris Peace Accords.<sup>191</sup> An unlawful taking of property entitles the claimant to damages which may exceed the value of fair compensation for the property had it been lawfully taken.<sup>192</sup> Because all of the property of Americans in South Vietnam was taken as a

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186. VO NHAN TRI, *supra* note 185, at 89-90.

187. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1), cmt. d (1987). A "going concern" is a business that is functional and operational at the time of its seizure and which continues to operate in the same or similar manner after seizure. The most frequently asserted "exceptional circumstances" justification for less than "full" compensation involves expropriation as part of a national program of agricultural land reform.

188. *Id.* at rep. note 3.

189. Brown, *supra* note 3, at 152.

190. U.N. CHARTER art. 2, ¶ 4. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . ." *Id.* This makes it clear that the use of armed force to achieve international political objectives is not legitimate. There is, of course, a self-defense exception to the ban on the use of force. See *id.* arts. 39, 51.

191. See *id.* art. 7.

192. See discussion, *supra* notes 116-18 and accompanying text.

direct result of unlawful aggression by North Vietnam, U.S. claimants are entitled to damages which would be heavier than compensation and which would specifically allow compensation for lost profits (*lucrum cessans*).

### 3. Iran-U.S. Claims Tribunal Precedent

Finally, full compensation is also required when the Vietnam expropriations are examined in light of the decisions of the Iran-U.S. Claims Tribunal, established under the Algiers Accords to adjudicate the takings of American property by the fundamentalist Iranian government following the overthrow of the Shah of Iran in 1979.<sup>193</sup> In Iran, the seizures followed the overthrow of the duly constituted government of the Shah and involved many industry-wide nationalizations of, for example, banking and oil production and a complete transformation of the political system from a sectarian autocracy to a fundamentalist Moslem theocracy.<sup>194</sup> Not even the widespread, systemic nationalization of entire industries following a political revolution was determined by the Iran-U.S. Claims Tribunal to merit deviation from the standard of full compensation under international law.<sup>195</sup> Similarly, Vietnam's subsequent widespread nationalization of industries and seizure of property in order to transfer wealth and transform the society to one based on socialist principles would not necessarily merit deviation from the full compensation standard for the property of U.S. citizens seized in 1975. The individual expropriations of private property undertaken months or years before systematic nationalization and economic reform<sup>196</sup> would almost surely not qualify for any exception to full compensation.<sup>197</sup> Whether the nationalizations would fall under the Restatement exceptions would depend, according to one commentator, on whether the seizures related to:

(i) land reforms or "indigenisation" which do not result in income for the State, or (ii) circumstances in which the nationalising State would otherwise have an overwhelming financial burden, or (iii) the large or extensive scale of the nationalisation directed at the establishment of State control over the economy or a substantially large sector of it, or (iv) the post-colonial character of the nationalisation.<sup>198</sup>

The nationalizations following the Communist victory over South Vietnam could not take advantage of considerations (i), (ii), or (iv)

193. See *supra* note 95.

194. One commentator explains the purposes of the Iranian nationalizations to have been to "(1) reorder Iranian industry which was in a chaotic state before and during the revolution, (2) redistribute wealth and ameliorate the harsher aspects of the capitalist system, and (3) remove dependence on foreign capital." Amerasinghe, *supra* note 85, at 45.

195. *Id.* at 62.

196. A large fraction of private businesses in South Vietnam were not seized by the state and nationalized until 1977. VO NHAN TRI, *supra* note 185, at 89.

197. *Id.*

198. Amerasinghe, *supra* note 85, at 48.

because the state did derive income from the seizure of land,<sup>199</sup> would not be burdened by the relatively small value of the U.S. claims,<sup>200</sup> and did not act in the context of decolonization because it had achieved independence from the French in 1954.<sup>201</sup> It could be argued that consideration (iii), "the large or extensive scale of the nationalization directed at the establishment of State control over the economy or a substantially large sector of it," might permit deviation from the standard of full compensation. The Iranian nationalization of its economy's largest sector, the oil industry, did not, however, justify deviation from full compensation even though the financial burden involved in those claims alone might have been considered overwhelming.<sup>202</sup>

Additionally, American property was seized immediately while most private businesses belonging to South Vietnamese were seized in subsequent nationalization or economic reform programs. Thus the seizures of Americans' property are more correctly seen as expropriations requiring full compensation rather than as part of nationalization, which may allow less than full compensation. Furthermore, satisfaction of one or more of the four considerations outlined above does not automatically permit the nationalizing nation to pay less than full compensation if other considerations point in the opposite direction. In the case of Vietnam, the small size of the American claims, even when including the potential value of the U.S. government's claims, suggests applying the full compensation standard as was applied in the Iran-U.S. Claims Tribunal decisions.

Not surprisingly, there is substantial domestic pressure on U.S. officials to obtain full satisfaction of claims from Vietnam. This pressure can be seen, for example, in the public statements of senators and congressmen. For instance, during testimony before the House Foreign Affairs Committee in February 1994, shortly after President Clinton announced the lifting of the economic embargo, Rep. Robert G. Torricelli and other members of the House of Representatives publicly urged the Clinton Administration to "seek the full value of the claims of private citizens" because no mitigating factors exist.<sup>203</sup>

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199. Excess (outside the family plot) agricultural production under the socialist system of collectivized farming imposed in South Vietnam went directly to the state. VO NHAN TRI, *supra* note 185, at 16-18, 81.

200. While private American claims at the time of their taking totalled about \$100 million, Vietnam's aid from the Soviet Union for defense and the military alone totalled \$5 billion annually during the late 1970s and early 1980s. BOUDREAU, *supra* note 33, at 48.

201. See HERRING, *supra* note 11, at 1-43.

202. The Iran claims filed and eventually adjudicated by the Iran-U.S. Claims Tribunal totalled over \$2 billion. See David P. Stewart, *Iran-U.S. Claims Tribunal: A Review of Developments, 1983-84*, 16 LAW & POL'Y INT'L BUS. 677, 683-86 (1984).

203. POW/MIA: *After the Embargo, Hearings Before the Asia and Pacific Subcomm. of the House Foreign Affairs Comm.*, 103rd Cong., 2nd Sess. (1994) (statement of Representative Robert G. Torricelli (D-NJ)).

Historically, the [State] Department has weighed several factors, including the strategic importance of reaching an agreement with the country, the morality of obtaining justice for U.S. citizens, and the availability of funds to satisfy the claims to determine the percentage of claims settlement. In the present case



In previous negotiations for satisfaction of foreign claims, however, the United States has often settled, for various foreign and economic policy reasons, for less than full compensation.<sup>204</sup> For example, since the United States began the practice of adjudicating claims prior to compensation negotiations with the offending country, it has subsequently negotiated settlement agreements with six countries.<sup>205</sup> Claimants in those six claims programs received only an average of 38.4% of the value of their awards.<sup>206</sup> Such lump-sum settlements are a failure when measured against the principles of international law because not only do U.S. claimants often not receive full compensation, but they do not receive it "promptly."<sup>207</sup> The standard six percent interest rate awarded by the FCSC<sup>208</sup> also does not adequately compensate claimants for the value of the loss of use of their money, particularly in the years since 1970 when interest rates often exceeded ten percent annually.<sup>209</sup>

In summary, U.S. claimants against Vietnam were entitled to full compensation under international law for their expropriated property. The business enterprises seized by North Vietnam, which constituted the vast majority of the U.S. property taken, were either natural resource investments or were operated by Vietnam after they were seized. Since the seizures were not conducted for agrarian land reform, they are not eligible for the deviation from full compensation which international law may permit in "exceptional circumstances."

#### B. Possible Vesting of Vietnamese Assets in the United States

Vietnam's agreement to pay the full value of U.S. claims was accompanied by a U.S. pledge to unfreeze Vietnamese assets held in U.S. banks.<sup>210</sup> This agreement averted the possible option of "vesting" Vietnamese assets to

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with Vietnam there would appear to be no legitimate reason why the Department would accept a figure that is less than the total principal and interest of the awards. There exist sufficient funds to satisfy the claims, the claims of the U.S. citizens have been adjudicated, and there is no strategic importance to justify accepting a lower settlement.

The U.S. government is the sole representative of our citizens' claims and has an obligation to them to reach the fairest possible settlement. These citizens have no legal recourse outside of the government's action. I urge the Clinton Administration to be as responsive to these citizens as they were to the government twenty years ago. We must forcefully assert the right of American claimants to full compensation.

*Id.*

204. Brown, *supra* note 3, at 140-41.

205. *Id.* at 141-43.

206. *Id.* The countries involved with the percentage of the value of claims received are as follows: Bulgarian claimants = 59.3%, Rumanian claimants = 28.9%, Hungarian claimants = 26.3%, Soviet claimants = 9.7%, Czech claimants = 73.1%, and Chinese claimants = 40.0%. The pre-adjudicated claims against Cuba and East Germany have not reached negotiated settlements. *Id.*

207. For example, the Chinese claims were not settled until 30 years after they arose. *Id.* at 143-44.

208. *Id.* at 144.

209. *Id.* at 145 n.256.

210. Greenhouse, *supra* note 9, at A1.

pay U.S. claimants. When North Vietnamese forces overran Saigon on April 30, 1975, the U.S. Department of the Treasury's Office of Foreign Assets Control, under orders of President Gerald Ford, froze all assets of the South Vietnamese government in U.S. banks.<sup>211</sup> With interest, the dollar value of blocked South Vietnamese assets reached well over \$240 million.<sup>212</sup> Had the United States decided to "vest" (seize and convert) these assets, they would have been more than sufficient to pay the \$200 million in U.S. claims adjudicated by the FCSC. In fact, legislation which would have done just that was introduced and considered, but never approved, by Congress in 1990.<sup>213</sup>

While vesting of blocked South Vietnamese assets would have allowed for immediate payment of private U.S. claims against Vietnam (a superficially attractive option which would have eliminated the need for extensive bilateral negotiation), such action would have been counterproductive to U.S. interests for several reasons. First, as these assets were the property of the South Vietnamese government, there is a question as to whether the Socialist Republic of Vietnam, the purported successor state to South Vietnam, even had legal title to the blocked assets.

The question of who actually owns the funds is really a question of state succession. The funds belonged to the former Government of the Republic of Vietnam [South Vietnam]. That government no longer exists. At the current time we do not recognize the Government of the Socialist Republic of Vietnam.<sup>214</sup>

Because the United States still does not officially recognize the Socialist Republic of Vietnam as the legitimate government in South Vietnam,<sup>215</sup> any claim that Vietnam would have had to these assets would have been contingent on the United States agreeing that Vietnam was entitled to them.<sup>216</sup>

Second, as a general rule, the United States does not support the seizure and conversion of another government's assets as a "self-help measure."<sup>217</sup> Only once has the United States vested the assets of a foreign government in peacetime to pay claims without the agreement of the government in question.<sup>218</sup> Vesting is an "irrevocable final action" in which title to the property is seized, which involves an actual confiscation of

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211. Lori Y. Vassar, *Foreign Assets Control: Proposed Vesting of Vietnamese Assets*, 84 AM. J. INT'L LAW 539 (1990).

212. *Id.* at 541.

213. *See* H.R. 2166, 101st Cong., 1st Sess. (1989).

214. Vassar, *supra* note 211, at 544.

215. *Id.* at 542.

216. *Id.*

217. *Id.* at 541.

218. *Id.* The United States vested Czechoslovakian steel mill equipment to pay claims arising out of post-World War II claims of Americans for property seized by the Czech government. Unsuccessful negotiations between the United States and Czechoslovakia for satisfaction of U.S. claims had lasted ten years, and the property was in danger of deteriorating to the point of worthlessness. This instance of vesting, was, therefore, practically unavoidable and should not be seen as precedent for the vesting of Vietnamese assets. *Id.*

property.<sup>219</sup> While the “owner” of the blocked assets (the South Vietnamese government) no longer exists, the conversion of the assets might nevertheless create a perception of the United States as an unsafe place for investment of foreign capital.<sup>220</sup> It is also likely that those states who recognize the Vietnamese government as the lawful successor to the South Vietnamese government would have seen the vesting as “arbitrary, unjustified, and counter to international practice.”<sup>221</sup> The vesting of South Vietnam’s assets might also have encouraged other states similarly to block assets owned abroad by the United States—a precedent the United States certainly did not want to encourage.<sup>222</sup>

Third, vesting the South Vietnamese assets to pay private claims of Americans would have left no assets to pay substantial U.S. government claims against Vietnam should negotiations have failed.<sup>223</sup> Such vesting might also have reduced the incentives for Vietnam to pay both private and government claims in the negotiated agreement since it would no longer have had the prospect of receiving the blocked assets in return for payment of the private and government claims.<sup>224</sup>

In sum, vesting of blocked South Vietnamese government assets was not a viable alternative to obtain compensation for private U.S. claims against Vietnam. It would have unnecessarily legitimized Vietnam’s claim to ownership of the blocked assets. It might have prejudiced the ability to obtain compensation for U.S. government property seized by Vietnam, poisoned the atmosphere surrounding negotiations for a settlement, and set a potentially damaging precedent for other nations considering the United States as a site for investment or contemplating blocking U.S. assets abroad in a crisis.

### C. Vietnamese Claims Against the United States

During the negotiations between Vietnam and the United States over satisfaction of U.S. claims for expropriated property, Vietnam surely raised the issue of its own claims against the United States. Of course, Vietnam demanded, as the successor state to South Vietnam, the release of \$250 million in assets of the former South Vietnamese government blocked by

219. *Id.* at 544.

220. *Id.* at 545. As the Director of the Office of Foreign Assets Control testified: The extent of foreign investment by the U.S. puts us in an extremely vulnerable position abroad. The United States has staunchly maintained that foreign property—whether U.S. property abroad or foreign property in the U.S.—cannot be taken without prompt adequate and effective compensation. To vest, or confiscate, [South Vietnamese] assets as proposed would set a damaging precedential example for countries less dedicated than the United States to the preservation of property rights.

*Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 544-45.

224. Vietnam “paid” the U.S. government’s claims by agreeing to turn over several U.S.-built buildings to the United States for use as diplomatic offices. *See* Greenhouse, *supra* note 9, at A1.

the United States since 1975.<sup>225</sup> Vietnam may also have sought guarantees of compensation for substantial environmental damage which the United States inflicted on South Vietnam by the widespread use of defoliants such as Agent Orange<sup>226</sup> and by the sheer immensity of the conventional military barrage inflicted on the countryside.<sup>227</sup>

## Conclusion

Under international law, American claimants who had property seized by Vietnam after the fall of South Vietnam on April 29, 1975 were entitled to full compensation, as valued by the FCSC, for their property. The presence of Vietnamese claims and the political and economic incentives surrounding the normalization of relations between two former adversaries could potentially have resulted in what has become common practice for the United States, accepting a lump-sum settlement for less than the full value of the claims. While courts have held that such lump-sum settlements do not diminish the requirement for "fair" compensation for expropriated alien property, as that term has been defined in international tribunal decisions, the United States nevertheless was correct in structuring its normalization "package" to include formal payment of the full value of meritorious American claims. While this objective may have required additional concessions on issues such as bilateral trade, Most Favored Nation status, and future economic assistance, the United States,

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225. See discussion, *supra* notes 210-13 and accompanying text.

226. Arthur H. Westing, *The Environmental Aftermath of Warfare in Vietnam*, 23 NAT. RESOURCES J. 365, 371 (1983). During the Vietnam War, a substantial quantity of dioxin (2,3,7,8-tetrachlorodiben/*o*-*para*-dioxin, or TCDD) was disseminated into the South Vietnamese environment as an impurity of Agent Orange, the defoliant used most heavily by the U.S. military. Dioxin is a highly potent human toxin and teratogen with apparent mutagenic and carcinogenic effects on humans. A 1980 estimate of the amount of dioxin disseminated was 170 kgs. on 1 million hectares of South Vietnam, with 90% of that amount distributed between 1966 and 1969 and with the majority of it applied to the provinces surrounding Saigon (now called Ho Chi Minh City). *Id.*

227. *Id.* at 374-75. One study concluded that approximately 1% (100,000 hectares) of the entire South Vietnam forest area was obliterated (converted to craters) by 10 million tons of high explosive bombs and shells which created 10 to 15 million large bomb craters, while another 40% (five million hectares) of the forest was subjected to shrapnel which injured the trees thereby leading to fungal entry and decay and significant tree mortality. Defoliant use is estimated to have caused 10-100% tree mortality on 12% (1.3 million hectares) of total South Vietnamese forest area, and clear cutting of forests for tactical military purposes completely removed all trees from another 3% (325,000 hectares) of South Vietnam's forest area.

Combining these estimates, and allowing for overlap in some instances, results in the conclusion that 4% (417,000 hectares) of forest area was totally destroyed, while another 50% (5.6 million hectares) was partially damaged. This destruction is estimated to have destroyed 75 million square meters of timber—approximately 14% of the standing merchantable timber crop in South Vietnam. *Id.*

Likewise, 41% (124,000 hectares) of the economically important coastal mangrove habitat comprising 300,000 hectares in South Vietnam, was destroyed by chemical defoliants. *Id.* at 377. Additionally, large-scale systematic crop destruction as a weapon against the Viet Cong is estimated to have affected 400,000 hectares of agricultural lands resulting in the immediate destruction of more than 300,000 tons of food. *Id.* at 382.

and the rest of the international community which espouse the full compensation standard, will reap long-term benefits by enforcing a worthy international law standard which promotes responsible settlement of private individuals' claims against other nations.